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No. 03-667

Supreme Court, U.S.
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In The

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Michigan Supreme Court correctly held that the First Amendment does not provide qualified immunity for defamation of a private figure where the defamation is committed in the context of petitioning activity?

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COUNTER-STATEMENT OF THE CASE

For purposes of the Petition, the factual background of this action is simple, straightforward and not subject to dispute. At no stage of this case have Petitioners challenged the facts found by the trial court or claimed that those findings were not supported by the evidence presented at trial.

Respondent, J & J Construction Company, was the lowest responsible bidder for the masonry portion of a swimming pool project to be constructed by the City of Wayne, Michigan. Petitioner Mark King, a business agent for Petitioner Bricklayers and Allied Craftworkers Local 1, appeared at the meeting of the Wayne City Council where J & J Construction's bid was being considered. At that meeting King made false statements that J & J Construction did poor quality work and did not have enough manpower to staff the job. Pet. App. 61a, 62a.[1] As a direct result of Petitioners' defamation of J & J Construction, the Wayne City Council awarded the contract to another bidder.

There is no dispute that King was acting as an agent of the Union when he made the defamatory statements. It is also undisputed that King never mentioned his affiliation with the Union during the meeting or raised the existence of any labor dispute involving J & J Construction.

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[1] In addition, King distributed inaccurate photographs, showing a minuscule portion of a previous project, which he falsely claimed depicted poor workmanship on the part of J & J Construction. Pet. App. 67a.

Petitioners attempt to raise issues regarding whether their defamation was the cause of J & J Construction's damages, and whether J & J Construction, characterized by Petitioners as "a person who performs a public function or who seeks to perform a public function," is something other than a private figure.

As acknowledged in the Petition, however, the trial court specifically found that King's statements "[were] in fact defamatory" and "did in fact cost J & J Construction the Wayne Aquatic Center Job." Pet. App. 68a. The trial court also specifically found "that J & J Construction was a private figure, and was not a public official in this particular case. . . . " *Id.* at 65a.

The record in this case establishes that J & J Construction is a private figure which sustained damages as a direct result of false, defamatory statements made to the Wayne City Council. The Petition must be considered, and rejected, upon this clear, unchallenged factual background.

REASONS FOR DENYING THE PETITION

The Petition is based on asserted conflict between the decision of the Michigan Supreme Court in this case and 1) decisions of the Seventh Circuit United States Court of Appeal and of the supreme courts of Maryland and Washington; and 2) this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). These purported conflicts are non-existent.

A. The Michigan Supreme Court Decision Does Not Conflict With Any United States Court of Appeal or Highest State Court Decision.

In reinstating the trial court's judgment in favor of J & J Construction on its defamation claim, the Michigan Supreme Court held that "a defamation defendant whose statements about a private figure are made while petitioning the government is not constitutionally entitled to a qualified immunity in the form of the heightened 'actual malice' standard." Pet. App. 9a. None of the cases upon which Petitioners rely conflicts with this holding, for the simple reason that in none of the cases was the issue of qualified immunity for defamation of a private figure presented.

In *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit specifically acknowledged that the plaintiff "was a public *official* – just like the [plaintiff] in *New York Times v. Sullivan*. . . . "[2] This finding was sufficient to justify application of the "actual malice" standard of proof to the plaintiff's defamation action. The Seventh Circuit did not, and had no need to, address the existence or extent of any petitioning privilege regarding defamation of a private figure.

In *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985), the plaintiff was a deputy sheriff and, thus, unquestionably a public official. In ruling that the defendant did not enjoy an *absolute* privilege from defamation liability, the court stated that, "[i]n light of *McDonald*, the

[2] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

qualified privilege recognized in *New York Times* and its progeny constitutes the *extent* of the constitutionally-mandated protection" of the Petition Clause. 498 A.2d at 272 (emph. added). The opinion cannot be read as expressing any holding regarding whether defamation of a private figure requires proof of actual malice.

Similarly, in *Richmond v. Thompson*, 130 Wn.2d 368, 377, 922 P.2d 1343, 1348 (1996), the court noted that the plaintiff was "a public official under *New York Times*." The plaintiff argued that a privilege "broader than the *New York Times* qualified privilege" should be applied when the public official is a police officer. Relying on *McDonald*, the Washington Supreme Court rejected this assertion, but expressed no opinion on the application of *New York Times* to defamation of a private figure.

The *only* case cited by Petitioners which actually addressed the application of the Petition Clause in a private figure defamation action is consistent with the decision of the Michigan Supreme Court here. In *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir. 1986) (*en banc*), 800 F.2d 787 (8th Cir. 1986) (rehearing *en banc*), *cert. denied*, 479 U.S. 1088 (1986), the Eighth Circuit directly held that where a defamation plaintiff is a private figure, the qualified privilege/actual malice standard under *New York Times* is inapplicable.

There is no conflict between the decision of the Michigan Supreme Court in this action and *any* decision of a United States Court of Appeals or the highest court of any State.

B. The Michigan Supreme Court's Decision Does Not Conflict With This Court's Decision in *McDonald v. Smith*.

In *McDonald v. Smith*, this Court was not presented with any issue regarding the existence or extent of a Petition Clause privilege against liability for defamation of a private figure. Although the fact was not discussed in the Court's opinion, the plaintiff was clearly a public figure who would have been subject to the *New York Times* actual malice standard in any other defamation action.

The principal *basis* for the Court's decision is found in the following language from the opinion, which has been either referred to or directly quoted in the cases relied upon by Petitioners:[3]

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. [Citation omitted.] These First Amendment rights are inseparable [Citation omitted], and there is no sound basis for granting greater constitutional protection for statements made in a petition to the President than other First Amendment expressions.

McDonald, 472 U.S. at 485.

The Michigan Supreme Court's holding was expressly based on the determination that "the United States Supreme Court has concluded that the right to petition should be accorded no greater protection than the rights to

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[3] *See, Miner v. Novotny*, 498 A.2d at 271; *Richmond v. Thompson*, 922 P.2d at 1349.

free speech and free press. *McDonald*, *supra* at 485." Pet. App. 9a. Accordingly, the court upheld the trial court's conclusion that J & J Construction was required to establish only that Petitioners' defamation was negligent in order to recover its damages. This ruling is in accord with this Court's determination in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that the First Amendment requires only that a private figure establish fault at least amounting to negligence in order to recover actual damages for defamation.

The trial court properly found that Petitioners, through King, made false, defamatory statements in a meeting of the Wayne City Council for the purpose, and with the desired effect, of depriving J & J Construction of the masonry contract for which it was the lowest responsible bidder. The trial court also properly found that the defamatory statements were *at least* negligently made. Under Michigan law, sanctioned by this Court's First Amendment decisions, these findings justified the judgment rendered in favor of J & J Construction.

The Michigan Supreme Court's decision upholding the defamation judgment is consistent with both the letter and the reasoning of this Court's decisions in *McDonald*, *New York Times* and *Gertz*, and Petitioners have shown no reason why their petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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